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Reflections on Designing Governance to Produce the Rule of Law

*Lisa Blomgren Bingham**

This symposium examines the relationship between the field of dispute resolution and the rule of law. This article explores these connections through two complementary lenses: dispute systems design and collaborative governance. It posits as a working hypothesis that it is possible to design governance as a necessary condition to produce the rule of law by using institutional and dispute systems design (DSD) across the policy continuum. It also argues that many rule of law interventions necessarily entail collaborative governance, which, broadly conceived, includes deliberative democracy, collaborative public management, and dispute resolution. Thoughtful design can coordinate collaborative and participatory programs across the policy continuum in ways that allow the branches of government (legislative, executive, and judicial powers) to reinforce each other synergistically. This article is only a first, preliminary effort to explore these connections. With that limitation, I conclude that systematically designing governance is a promising approach to help international actors achieve their goal, the rule of law.

This article first briefly reviews definitions of the rule of law. Second, it briefly reviews current understandings and approaches to governance. Third, it introduces the concept of dispute systems design, its application to collaborative governance across the policy continuum, and failures in the rule of law as seen through this frame. Finally, it provides examples of rule of law initiatives organized across the policy process in governance.

I. DEFINING THE RULE OF LAW

The phrase ‘rule of law’ has many uses and is associated with a variety of criteria. In current legal scholarship, it appears in connection with a debate that takes us back to the ancient Greeks: should law come from the sovereign or should law be the sovereign? Associate Justice Antonin Scalia recently argued that the rule of law should be a law of rules.¹ This debate weighs the value of democratically adopted general rules against the importance of judicial discretion to do justice and create law ad hoc.² This debate also generally considers the rule of law

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1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 CHIC. L. REV. 1175 (1989).

2. *Id.* at 1176.

through its ends, such as law and order, a government bound by law, and human rights.³

However, in the international arena, the phrase “rule of law” has taken on a variety of other meanings focused more on the means to these ends.⁴ For example, one scholar argued that international rule of law initiatives seek to create “the proper institutional attributes—the ‘necessary’ laws, a ‘well-functioning’ judiciary, and a ‘good’ law enforcement apparatus,”⁵ which she alternatively characterized as “an efficient and trained judiciary, a non-corrupt police force, and published, publicly known laws.”⁶ The United States Agency for International Development (USAID) combines means and ends by seeking five elements: order and security, legitimacy, checks and balances, fairness, and effective application.⁷

One might also organize these ‘means and ends’ differently; one could characterize them as either procedural or substantive.⁸ I use the terms procedural and

3. Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, 33-34 (2006).

4. For a description of evolving conceptions of the rule of law in development efforts, see David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74 (DAVID M. TRUBEK AND ALVARO SANTOS, EDS., 2006).

5. Kleinfeld, *supra* note 3, at 33.

6. *Id.* at 34.

7. For example, the following excerpt from its *Users Guide to DG Programming*, 45 (2010), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/DG_UserGuide_November10.pdf (last accessed Mar. 6, 2011) includes both means and ends in efforts to strengthen five elements comprising the rule of law:

Order and security: Establishing, rebuilding or expanding justice institutions; crime prevention, community security and civilian policing; disarmament, demobilization and reintegration process; and witness and court personnel protection programs.

Legitimacy: Constitutional drafting processes; legal reform commissions and citizen mobilization; harmonization of non-state customary or religious law with state-based law; and transitional justice mechanisms to address past abuses.

Checks and Balances: Establishing or strengthening independent judicial bodies; upgrading or reforming judicial career processes; improving working conditions for judicial personnel; strengthening judicial administration, management and self-governance; strengthening independent judicial and legal professional associations; enhancing judicial professional development and access to the laws; and stimulating citizen support for judicial independence.

Fairness: Reforming and implementing procedural codes; reforming administrative law; improving transparent and efficient administration of justice system components; expanding access to legal services; improving the quality of private defense; improving the accessibility of the state justice system; supporting or expanding alternative dispute resolution; increasing citizen awareness of human rights standards and issues; strengthening human rights institutions; and working with non-state justice institutions to improve access to justice.

Effective Application: Improving investigative capacity of police and/or prosecutors; enforcing judgments; and strengthening the implementation of administrative law and procedure.

8. Thomas Carothers, *Rule of Law Temptations*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW*, 17, 20-21 (JAMES J. HECKMAN, ROBERT L. NELSON, AND LEE CABATINGAN, EDS., 2010), observed: Early on, some rule-of-law aid actors, particularly those who came to their work primarily out of a concern for economic development, inclined toward a relatively formalist or proceduralist conception of the rule of law. Such a conception stresses procedural fairness and institutional inefficiency. It leans in the direction of rule *by* law as much as rule *of* law. Over these two decades, however, supporters of a broader conception of the rule of law gained ground in international development circles. This broader conception holds that the rule of law is about substantive outcomes, not just procedural norms. It views basic political and civil rights as essential to ensuring justice and an integral part of the rule of law.

Id.

substantive similarly to the distinction between procedural and substantive due process of law in U.S. constitutional law. For example, depending upon the context, procedural due process may include some or all of the protections the U.S. Supreme Court articulated in *Goldberg v. Kelly*: timely and adequate notice, presenting evidence orally, confronting adverse witnesses, cross-examining adverse witnesses, having government disclose opposing evidence, access to legal counsel, presenting oral arguments, an impartial decision-maker who decides the case on the hearing record, and a decision that states the reasons and the evidence.⁹ In contrast, substantive due process entails defining the terms life, liberty, and property as those words are used in the Fifth and Fourteenth Amendments. The U.S. Supreme Court constructed a rationale for a substantive right to privacy by reference to rights to free speech, freedom of association, freedom from unreasonable searches and seizures, and freedom from self-incrimination under the First, Fourth, and Fifth Amendments.¹⁰ Procedures have to do with how government takes action; substance has to do with what action it takes.

Procedural approaches to the rule of law include making government accountable through the separation of legislative, executive, and judicial powers,¹¹ as did the drafters of the U.S. Constitution.¹² Similarly, transparency is a procedural choice. Freedom of information laws, public records, and open access to government meetings all provide the public a process to view government in action;¹³ sunshine is the great sanitizer of corruption. Participatory democracy, which entails collaboration and voice in governance, represents a procedure both for transparency and for enhancing the information available to government decision-makers.¹⁴ Better information enhances the quality of decisions.¹⁵ In theory, separation of powers is a procedure that creates an independent judiciary, one free from corruption in the form of control by the executive branch. Arguably, it is also procedural to provide a judiciary that is efficient and effective.

In contrast to these procedural choices for achieving the rule of law, there are also underlying substantive ones that involve fundamental values.¹⁶ Protection of human and civil rights,¹⁷ and protection of property from expropriation are substantive measures of the rule of law.¹⁸ Others argue that the rule of law entails a

9. *Goldberg v. Kelly*, 397 U.S. 254, 267-270 (1970).

10. *Griswold v. Connecticut*, 381 U.S. 479 *passim* (1965).

11. Kenneth W. Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 4 (2006).

12. See generally *THE FEDERALIST*, <http://www.constitution.org/fed/federa00.htm> (last accessed Mar. 6, 2011).

13. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 308 (2010).

14. See generally *id.*

15. See, e.g., President Barack Obama, *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4685 (Jan. 26, 2009).

16. Daniel B. Rodriguez, Mathew D. McCubbins, & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1469 (2010).

17. Carothers, *supra* note 8; Terence C. Halliday, *The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW* 210 (JAMES J. HECKMAN, ROBERT L. NELSON, AND LEE CABATINGAN, EDS., 2010).

18. KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 15 (2006).

baseline of physical security¹⁹ and satisfaction of basic needs for food, water, shelter, and health care.²⁰ Substantive measures provide litigants with fairness, equal justice under the law analogous to aspects of equal protection under the Fourteenth Amendment, and access to justice for the poor.

All of these choices, whether substantive or procedural, represent possible structural components that dispute systems designers can use in a comprehensive design of governance.

II. THE RELATION OF GOVERNMENT AND GOVERNANCE TO THE RULE OF LAW

Often, the underlying premise of international initiatives is that good governance can help produce the rule of law. The World Bank identifies six dimensions of governance in its Worldwide Governance Indicators: (1) voice and accountability; (2) political stability and the absence of violence; (3) government effectiveness; (4) regulatory quality; (5) rule of law; and (6) control of corruption.²¹ This illustrates how circular some of the definitions of rule of law can be; rule of law requires good governance, but a measure of governance is the rule of law. These governance indicators are a mixture of rule of law means and ends, and of procedural and substantive interventions and outcomes.

However, definitions of governance vary widely.²² A recent review of governance literature for legal scholars suggested the following definition: "Governance may be defined as organized efforts to manage the course of events in a social system. Governance is about how people exercise power to achieve the ends they desire, so disputes about ends are tied inextricably to assessments of governance means."²³

Governance is more than simply government or the sum of the legislative, executive, and judicial powers. More than a decade ago, a leading scholar in the field of public administration, Professor George Frederickson, observed that the field was moving "toward theories of cooperation, networking, governance, and institution building and maintenance" in response to the "declining relationship between jurisdiction and public management" in a "fragmented and disarticulated state."²⁴ In a recent comprehensive study, Professor Mark Bevir observed that a

19. Margaret Levi and Brad Eppercly, *Principled Principals in the Founding Moments of the Rule of Law*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 192 (JAMES J. HECKMAN, ROBERT L. NELSON, AND LEE CABATINGAN, EDS., 2010).

20. James J. Heckman, *The Viability of the Welfare State*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 94 (JAMES J. HECKMAN, ROBERT L. NELSON, AND LEE CABATINGAN, EDS., 2010).

21. World Bank, Worldwide Governance Indicators, available at <http://info.worldbank.org/governance/wgi/index.asp> (last accessed Mar. 7, 2011).

22. For a review of the current theories and literature on governance, see Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

23. Burris, et al., *supra* note 22, at 3.

24. H. George Frederickson, *The Repositioning of American Public Administration*, 32 PS: POLITICAL SCIENCE AND POLITICS 701, 702 (1999). The seminal works in public affairs are THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2002), and Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); see also Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999).

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variety of academic disciplines use the word 'governance' without engaging each other; he suggests the following as the most general meaning:

[G]overnance refers to theories and issues of social coordination and the nature of all patterns of rule. More specifically, governance refers to various new theories and practices of governing and the dilemmas to which they give rise. These new theories, practices, and dilemmas place less emphasis than did their predecessors on hierarchy and the state, and more on markets and networks.²⁵

This identifies three distinctive features of modern governance: it is hybrid, multi-jurisdictional, and has plural stakeholders who operate in networks.²⁶

In legal scholarship, this understanding of governance is sometimes referred to as "the new governance," which includes the use of policy tools that involve privatization of previously public work and devolution of responsibility from unitary bureaucracies to networks and contractors.²⁷ Some have characterized new governance legal scholarship as a new form of legal realism, one that looks pragmatically at law in context and in action; these legal scholars "seek[] to reinvent governance from the 'bottom up' by rejecting ancient administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders."²⁸

Another related stream of literature concerns "collaborative governance."²⁹ Collaborative governance includes the public and stakeholders in decision-making across the policy continuum through deliberative democracy, collaborative public management, and alternative dispute resolution (ADR) in the policy process; these provide ways for people to exercise voice and to work together in governance.³⁰

25. Mark Bevir, *Governance as Theory, Practice, and Dilemma*, in *THE SAGE HANDBOOK OF GOVERNANCE I* (MARK BEVIR, ED., 2011).

26. *Id.* at 2.

27. See, Symposium *New Governance and the Transformation of Law*, 2010 WIS. L. REV. 1 (2010); Bradley C. Karkkainen, Reply, "New Governance" in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Orly Lobel, *Surreply, Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575; Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139 (2006).

28. Howard Erlanger et al., *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 357; see also, Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395 (2003).

29. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543 (2000). Professor Freeman argued that public/private interdependence is a reality best understood as a set of negotiated relationships in which "public and private actors negotiate over policy making, implementation, and enforcement." She ultimately rejected the term governance in favor of "problems to confront and decisions to make," observing "[t]here is nothing to govern." *Id.* at 548. She advocated institutional analysis and design, arguing that institutional design should move away from the traditional legislative, executive, and judicial branches to an examination of alternative private institutions and stakeholders and the role they can effectively play in governance.

30. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009). (In this article, I

Upstream in policy formation, collaborative governance entails dialogue and deliberation, or deliberative democracy,³¹ as contrasted with the traditional adversarial processes of governance, which usually entail debate. Deliberative democracy uses a variety of models and techniques for engaging the public and stakeholders.³² Midstream in policy implementation, collaborative governance also entails collaborative public management, through which agencies and stakeholder organizations from the private and nonprofit sectors cooperate to provide public services through a variety of contractual arrangements or policy tools.³³ Downstream, collaborative governance generally entails ADR in quasi-judicial or judicial government contexts.³⁴

Collaborative governance can include the broadest scope of partners within and outside government, including the public, transnational, national, state, regional, and local government agencies, indigenous peoples, nonprofit organizations, businesses, and other nongovernmental stakeholders.³⁵ Collaborative governance produces participatory decision-making. It may produce transparency by forcing government to provide information to the public in order to allow them to participate. This in turn can provide accountability by allowing the public to exercise voice in government. In theory, collaborative governance may be more efficient than hierarchical decision-making, in that many diverse voices provide

describe the spectrum of collaborative governance processes as including dialogue and deliberation, collaborative public management, and alternative dispute resolution. I argue they represent a single related phenomenon of non-adversarial voice that operates across the policy continuum, including legislative, executive, and judicial functions).

31. In dialogue, participants engage in a reasoned exchange of viewpoints, in an atmosphere of mutual respect and civility, in a neutral space or forum, with an effort to reach a better mutual understanding and sometimes even consensus. In debate, participants listen in an effort to identify weaknesses in the argument and score points in an effective counterargument; in deliberation and dialogue, participants listen in an effort to better understand the other's viewpoint and identify questions or areas of confusion to probe for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas. For a number of case studies and essays on deliberative democracy, see *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (Archon Fung & Erik Olin Wright eds., 2003), and *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY* (John Gastil & Peter Levine eds., 2005).

32. These include the AmericaSpeaks 21st Century Town Meeting, Appreciative Inquiry, Bohmian Dialogue, Citizen ChoiceWork Dialogues, Citizens Juries, Compassionate Listening, Consensus Conferences, Conversation Café, Deliberative Polling, Dynamic Facilitation and the Wisdom Council, Future Search, Intergroup Dialogue, National Issues Forums, Nonviolent Communication, Online D&D, Open Space Technology, Public Conversations Project, Study Circles, Sustained Dialogue, Wisdom Circles, and World Café, among others. For more information, see National Coalition for Dialogue and Deliberation, <http://ncdd.org/rc/item/4856> (last visited Mar. 14, 2011).

33. See generally ROBERT AGRANOFF, *MANAGING WITHIN NETWORKS: ADDING VALUE TO PUBLIC ORGANIZATIONS* (2007); ROBERT AGRANOFF & MICHAEL MCGUIRE, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* (2003); EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP* (1998); *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (Lisa Blomgren Bingham & Rosemary O'Leary eds., 2008); *THE COLLABORATIVE PUBLIC MANAGER* (Rosemary O'Leary & Lisa Blomgren Bingham eds., 2009).

34. See generally, JEROME T. BARRETT WITH JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* (2004); see also, the website of the Federal Interagency ADR Working Group, www.adr.gov (last accessed Mar. 14, 2011).

35. See, e.g., the E-Government Act, 44 U.S.C. §§ 3601-3606 (2002).

government with better and more complete information upon which to base decisions.³⁶

Using these new understandings of governance, the range of interventions available to dispute systems designers interested in the rule of law encompasses not only institutional reforms within the branches of government, but also experiments that entail partnerships with a variety of stakeholders and the public outside government. The question is how to relate experiments in this broader conception of governance to the notion of *good* governance.³⁷

Within the U.S. executive branch, the legal framework for governance strikes a balance among five fundamental values in the relationship between the government and the governed that represent good governance: accountability, efficiency, transparency, participation, and collaboration.³⁸ These values recognize the im-

36. See, e.g., Obama, *supra* note 15.

37. Burris, *et al.*, *supra* note 22, at 3, observed:

"Governance" is not synonymous with "good governance." Any given contemporary governance system may be inefficient, corrupt, or unresponsive to the needs of the governed. Governance can be "good" in at least two senses: it can deliver good results and it can work through processes and institutions that meet broadly accepted standards of justice and due process. Ideally governance is good in both of these ways, and, indeed, many people believe that governance that fails the second criterion normally will have difficulty delivering on the first.

This definition also recognizes the distinction between means and ends in discussions of the rule of law.

38. A comprehensive survey of the literature regarding these values is beyond the scope of this Article. For thoughtful discussions of one or more of these values in administrative law and process, see, e.g., David L. Markell, "Slack" in *The Administrative State and its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 19-40 (2005) (examining the relationship between transparency and accountability); David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008) (examining empirical evidence regarding claims that citizen participation leads to inefficient decision-making); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (arguing that mass participation in agency decision-making is economically inefficient and comes at the expense of deliberative democratic practice); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (providing an in depth analysis of theories of administrative accountability and debunking many of them); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541 (1992) (advocating deliberative public participation early in the policy development process in administrative agencies as a means of ensuring accountability and legitimacy); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) (critiquing arguments in favor of collaboration as a means to make the regulatory system more efficient, and arguing for participation by a community of individuals with common interests who represent and are accountable to stakeholders); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001) (examining and critiquing Office of Management and Budget scrutiny of cost-benefit analyses, congressional committee oversight of rulemaking, and congressional fast-track review as means of accountability); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. Summer/Autumn 2005, at 63 (examining how U.S. administrative law might provide a model for making global regulatory regimes more accountable through participation, transparency, and judicial review). One might argue that substantive effectiveness as part of efficiency. *Personal communication with Prof. David L. Markell on Feb. 27, 2010 (on file with author)*. On the other hand, it may be a sixth value. Substantive effectiveness is reflected in administrative law through requirements for cost benefit analysis. See generally, John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). It is also reflected in the Government Performance and Results Act, 31 U.S.C. §§ 1105-1119, 9703-9704 (2006), which requires agencies to develop strategic plans and establish metrics for the success of their work. Yet a third alternative is that all administrative laws seek to improve the quality of substantive decision-making by addressing the forms and sources

portance of governance as a relation among government, stakeholders, and the broader public outside government. Transparency provides information to those outside government. Participation allows those outside government to provide information and exercise voice as to government decision-making. Collaboration allows government to take advantage of other social resources, those of stakeholders and the public, to help manage the process of making, implementing, and enforcing decisions in the social system through cooperation.

Designing governance in the modern world means more than simply creating a constitution that establishes branches of government and well functioning public institutions. It means more than fair elections. Governance necessarily entails a complex dance with public, private, or nonprofit stakeholders and with the public more generally to make, implement, and enforce the law. Governance happens as a function of system dynamics; government's branches and agencies interact with each other, with stakeholders, and with the public.³⁹ To achieve the rule of law, we must design interventions with a view toward how they fit in this larger system context of governance.

III. DISPUTE SYSTEMS DESIGN ACROSS THE POLICY CONTINUUM

This article argues that rule of law initiatives can benefit from dispute systems design that considers these initiatives in their larger governance context across the policy continuum. First, this section will introduce the field of dispute systems design (DSD). Second, this section will briefly define the policy continuum for collaborative governance and rule of law interventions. Third, it will examine failures in the rule of law through this lens. Finally, it analyzes one area of rule of law work, international election principles, from the perspective of DSD.

A. Dispute Systems Design

A conflict, issue, dispute, or case submitted to any institution for managing conflict (including one labeled ADR) exists in the context of a system of rules, processes, steps, and forums. In the field of ADR, this is called dispute systems design (DSD).⁴⁰ In its initial usage, DSD applied to systems for managing ripe conflicts. For example, the model system is the collectively bargained grievance procedure. Unions submit breach of contract claims to a grievance procedure culminating in the quasi-judicial forum of labor arbitration.⁴¹ Early work on DSD examined how inserting a mediation step before arbitration, termed 'grievance mediation,' might change the dynamics of the system as a whole, speeding up the

of information upon which agencies act. Thus, the five values reflect the use of process; effectiveness examines outcome.

39. See generally, Eugene Bardach, *Policy Dynamics*, in MICHAEL MORAN, MARTIN REIN, AND ROBERT E. GOODIN, EDS., *THE OXFORD HANDBOOK OF PUBLIC POLICY* 336 (2006) (examining system dynamics in governance, a relatively new perspective and field).

40. LISA BLOMGREN BINGHAM, JANET K. MARTINEZ, AND STEPHANIE SMITH, *DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* (forthcoming).

41. See WILLIAM L. URY, ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 56 (Jossey-Bass, Inc. 1988).

overall resolution of conflict and reducing the number of cases that required a more costly outside arbitrator.⁴²

DSD is the applied discipline of institutional design; DSD scholars work in the fields of law,⁴³ human resources management,⁴⁴ and organizational development.⁴⁵ Smith and Martinez explained that DSD entails understanding nested institutions by analyzing their goals, processes and structures, stakeholders, resources, success, and accountability.⁴⁶ Professors William Ury, Jeanne Brett, and Stephen Goldberg described the purposeful creation of an ADR program in an organization to manage conflict through a series of steps or options for process.⁴⁷ In its best practice, DSD also uses inclusive, participatory, stakeholder-driven processes to change existing or create new dispute resolution structures.⁴⁸ Its goal is to improve the capacity of systems to prevent, manage, or resolve certain streams or kinds of conflict.

There are related literatures in political science and other social science disciplines that shed light on its broader context: systems through which humans organize themselves for collective action. Institutional Analysis and Development (IAD) is an effort to explore and explain the wide diversity of institutions that humans use to govern their behavior.⁴⁹ Institutions arise, operate, evolve, and change.⁵⁰ Similarly, DSDs are institutions for resolving conflict that are also

42. Jeanne M. Brett and Stephen B. Goldberg, *Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49 (1983). Brett and Goldberg studied DSD in the coal industry. After a series of wildcat strikes, it became clear that the traditional multi-step grievance procedure culminating in binding arbitration was not meeting the needs of coal miners, unions, and management. As an alternative, the parties tried an experiment: grievance mediation. This involved providing mediation, a process for resolving conflict based on interests, as soon as disputes arose. The addition of the grievance mediation step changed the traditional rights-based grievance arbitration dispute system design to one including an interest-based 'loop-back', i.e., a step that returned the disputants to negotiation, albeit with assistance.

43. Stephanie Smith and Janet K. Martincz, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

44. See, e.g., DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* (2003).

45. See, e.g., CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (Jossey-Bass 1996).

46. Smith and Martincz, *supra* note 43, at 133.

47. WILLIAM L. URY, ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 41–64 (1988). Interest-based systems focus on the disputants' underlying needs (interests), such as those for security, economic well-being, belonging to a social group, recognition from others, and autonomy or control. Rights-based processes focus on legal entitlements under the language of a contract, statute, regulation, or court decision. Power-based systems are least effective as a basis for resolving conflict; workplace examples include strikes, lockouts, and corporate campaigns.

48. COSTANTINO & MERCHANT, *supra* note 45, at 49–66.

49. See generally, ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (Cambridge University Press 1990); ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (Princeton University Press 2005). Examples of the diversity of its application include "regularized social interactions in markets, hierarchies, families, sports, legislatures, elections" and others. *Id.* at 5. The study of institutional design is the subject of literature in political science, economics, sociology, public affairs, and policy analysis.

50. Ostrom, *UNDERSTANDING INSTITUTIONAL DIVERSITY*, *supra* note 49, at 6. Ostrom attempted to identify an underlying set of universal building blocks and a method for researching institutions and how they function. She argued that these universal building blocks are arranged in layers that one can

amenable to institutional analysis.⁵¹ A key feature of the IAD framework is to examine institutions as nested action arenas. The notions of DSD and nested institutions can clarify how we think of initiatives directed at producing the rule of law by helping to see initiatives in relation to each other and the overarching governance system.

Pursuant to the Constitution, the U.S. government has created civil and criminal justice systems or DSDs. In the context of a single national government, many ADR systems exist in the shadow of these traditional justice systems; in this way they are nested in courts.⁵² For example, DSD encompasses the creation of systems for processing many similar claims in court,⁵³ as in mass torts and special claim processing facilities that are nested in the judicial branch.⁵⁴ It also encompasses the creation of systems within administrative agencies for handling both their own internal conflict and for carrying out their public mission to create, implement, and enforce public policy; these are nested in the executive branch subject to review by the judicial branch.⁵⁵

Over the past three decades, there has been considerable research on dispute resolution systems in various substantive contexts, including court programs⁵⁶ and programs in employment,⁵⁷ education,⁵⁸ the environment,⁵⁹ community media-

analyze using the IAD framework. A basic building block is an action arena or action situation. To analyze an action situation, Ostrom used seven categories of information:

- (1) the set of participants [single individuals or corporate actors], (2) the positions to be filled by participants, (3) the potential outcomes, (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages], (5) the control that an individual has in regards to this function, (6) the information available to participants about actions and outcomes and their linkages, and (7) costs and benefits – which serve as incentives and deterrents – assigned to actions and outcomes.

These are the common structural components that represent the building blocks for all institutions at their most general level. *Id.* at 32, and *see generally* Chapter 2, at 32-68. Ostrom explained how to operationalize these concepts using game theory to structure experiments in a laboratory in Chapter 3, at 69-98.

51. Kenneth M. Ehrenberg, *Procedural Justice and Information in Conflict-Resolving Institutions*, 67 ALB. L. REV. 167, 175-76 (2003).

52. Marc Galanter & Mia Cahill, *Symposium on Civil Justice Reform: "Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349-50 (1994).

53. *See, e.g.*, Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

54. *See, e.g.*, Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007).

55. *See generally*, Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009); Lisa B. Bingham, et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547 (2005).

56. For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, *see* The Resolution Systems Institute, <http://aboutrsi.org/publications.php?slD=9> (last visited Mar. 6, 2011); The Federal Judicial Center, http://www.fjc.gov/library/fjc_catalog.nsf (last visited Mar. 6, 2011); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004); for a recent review of court-connected ADR using DSD as its organizing frame, *see* Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RES. Q. 55 (2004); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. REV. 69 (2002).

57. Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RES. Q. 145 (2004) (concluding that DSDs using mediation has proven itself capable of producing positive organizational outcomes, while there is no evidence that non-union employment arbitration has that

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tion,⁶⁰ family and domestic relations,⁶¹ and victim-offender mediation or restorative justice.⁶² With the exception of ADR in the environment, most of these sys-

impact); and see also related commentary, David B. Lipsky & Ariel C. Avgar, *Commentary: Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RES. Q. 175 (2004) (advocating multivariate models and more sophisticated statistical techniques to measure the impact of employment dispute resolution).

58. Tricia S. Jones, *Conflict Resolution Education: The Field, the Findings, and the Future*, 22 CONFLICT RES. Q. 233, 243–51 (2004) (reporting that peer mediation in the elementary schools has positive outcomes for student mediators in that they gain in social and emotional intelligence, and schools gain in improved classroom and school climate, while there is some but less evidence for middle school and high school programs, and arguing for more assessment on curriculum, including conflict resolution, bullying prevention, dialogue and communicative arts); Jennifer Batton, *Commentary: Considering Conflict Resolution Education: Next Steps for Institutionalization*, 22 CONFLICT RES. Q. 269, 270–76 (2004) (arguing for institutionalization of conflict resolution education across programs and for all educators).

59. E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RES. Q. 191, 192 (2004) (identifying key structural elements that distinguish environmental conflict resolution from other uses of mediation, including its use for upstream conflict in policy making and planning); Kirk Emerson, Rosemary O'Leary, & Lisa B. Bingham, *Commentary: Comment on Frank Dukes's "What We Know About Environmental Conflict Resolution"*, 22 CONFLICT RES. Q. 221, 223–29 (2004) (describing a national database for environmental conflict resolution cases through which data on design differences and outcomes will accumulate over time).

60. Timothy Hedeon, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RES. Q. 101 (2004) (reporting that community mediation centers handle cases in a cost and time effective way while resolving a broad array of disputes in an appropriate and respectful way). On the need for research related to program design, Hedeon observed, "[o]rganizational level research into case screening criteria and methods, referral systems and funding relationships, program accessibility, and outreach efforts will benefit the field greatly, providing the basis for informed planning and decision making, as well as enhanced services." *Id.* at 126. He also raised the question of whether community mediation democratizes justice and leads to greater self-sufficiency. *Id.* at 127. See also Linda Baron, *Commentary: The Case for the Field of Community Mediation*, 22 CONFLICT RES. Q. 135, 135–36 (2004) (articulating a strategy for action through consistent data collection across varying centers implemented through a mini-grant program by the National Association for Community Mediation with support from the Hewlett Foundation).

61. Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RES. Q. 3 (2004). Kelly's introduction highlights our need for more systematic institutional analysis in dispute system design: Variations in research populations, methodologies, measures, and dispute settings have been the norm, making it problematic to generalize about family mediation or rely on a single study. Many research publications failed to provide basic descriptors, such as the nature of the population served, number of sessions and hours of service, the model (if any) mediators used, and whether premediation screening was used. Legal rules and cultural contexts of the jurisdiction that might affect outcomes were rarely described. Despite these problems, convergence on many questions has emerged over two decades, indicating that some major findings regarding family mediation are robust and replicable across settings. *Id.* at 3–4. Based on studies of mediation in California, Colorado, Ohio, Virginia, and Ontario, Canada, Kelly concluded that mediation has proven itself capable of settling highly emotional disputes (settlement rates range from 50 to 90 percent) with durable resolutions and high participant satisfaction, although higher when there is an agreement than without. *Id.* at 28–29. In addition, she reported that participants felt that they were heard, respected, given a chance to say what was important, and not pressured to settle. *Id.* at 29. They also felt they had learned to work together and that the agreement would be good for their children. *Id.* at 29. See also Donald T. Saposnek, *Commentary: The Future of History of Family Mediation Research*, 22 CONFLICT RES. Q. 37, 38–49 (2004) (advocating research that is longitudinal, and examines antecedent conditions, screening and triage of cases, the actual process of mediation, and outcomes for children).

62. Mark S. Umbreit, Robert B. Coates, & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RES. Q. 279, 287–96 (2004) (concluding that victim-offender mediation is usually effective at meeting the needs of those who participate, generally has a positive impact on restitution and recidivism rates, and has potential to reduce the costs of certain juvenile and

tems address conflict downstream in the policy process and provide an alternative to agency adjudication or judicial branch civil and criminal justice systems. While the designs of these systems vary widely, research on why systems take certain designs in certain substantive and institutional contexts, and which designs are most effective, is still in its infancy.

DSD is a lens through which to examine not only domestic justice systems, but also emerging global ones. In the absence of an authoritative global sovereign, all dispute resolution for conflict that crosses national borders depends upon consent. Nation-states consent to a dispute resolution process or forum through treaties; for transnational private conflict, disputants consent through contracts. Treaties incorporate conciliation, mediation, or arbitration for disputes, sometimes through new international courts.⁶³ Moreover, entities such as the European Union (EU) are fostering the creation of private dispute resolution mechanisms.⁶⁴ The World Bank⁶⁵ and USAID⁶⁶ are pressing for private dispute resolution systems as basic legal infrastructure. As it becomes clear that international law is essentially systems for international dispute resolution, it also becomes clear that DSD can help structure these new systems.

B. Governance and DSD Across the Policy Process

The international community sponsors rule of law initiatives that seek to address varieties of conflict within a nation-state, including those stemming from a past or ongoing civil war or insurgency, the breakdown of civil society following a disaster, or transition from one form of government to another. However, these interventions are often haphazard or directed at a single branch of government or institution within that branch as the means; consequently, they do not always achieve rule of law ends.⁶⁷ Dr. Rachel Kleinfeld observed that “because achieving such ends requires reform *across* institutions while institutional reforms are generally carried out *within* single institutions, institutional reform can be undertaken with no significant effect on rule-of-law ends.”⁶⁸

criminal cases); Howard Zehr, *Commentary: Restorative Justice: Beyond Victim-Offender Mediation*, 22 CONFLICT RES. Q. 305, 305–06 (2004) (describing other models of restorative justice, including family group conferences and peacemaking circles).

63. See, e.g., International Court of Justice, <http://www.icj-cij.org> (last visited 3/6/11); see also World Trade Organization, <http://www.wto.org> (last visited Mar. 6, 2011).

64. See Europa Press Releases: A boost for mediation in civil and commercial matters: European Parliament endorses new rules, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/628&format=HTML&aged=0&language=EN&guiLanguage=en> (last accessed Mar. 6, 2011).

65. See World Bank: Knowledge Resources for Financial and Private Sector Development, <http://rru.worldbank.org/Toolkits/AlternativeDisputeResolution> (last accessed Mar. 6, 2011).

66. See generally, USAID: *Users Guide to DG Programming*, 55 (2010), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/DG_UserGuide_November10.pdf (last accessed Mar. 6, 2011), which references the Federal Mediation and Conciliation Services' work assisting countries with industrial dispute systems design and consensus building.

67. Kleinfeld, *supra* note 3, at 34; see also Gary Goodpaster, *Law Reform in Developing Countries, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* 106 (TIM LINDSEY, ED., 2007) (discussing the necessity of social and political context in designing legal reform efforts to achieve the rule of law).

68. Kleinfeld, *supra* note 3, at 34.

To achieve the end or goal of the comprehensive rule of law, designers must view these interventions more systemically and holistically. This argument is consistent with the critique of sequentialism in rule of law scholarship. Sequentialism is the theory that political and civil liberties and democratic reform cannot take place until a country has achieved a certain level of economic development.⁶⁹ Thomas Carothers is critical of this theory, in that he argued it assumes authoritarian leaders will bring democratic reform to their people, but they have a conflict of interest with their own people.⁷⁰ Thus, instead of approaching economic development and democratization sequentially, Carothers argued that international aid groups must seek both through interwoven initiatives.⁷¹ They must examine interventions as nested in institutions across the entire policy process, which includes the legislative, executive, and judicial powers or branches within government as a whole.

At its most general, the policy process consists of stages in a continuous and dynamic system. The stages include identifying policy problems; identifying approaches or tools for solving the policy problems;⁷² setting priorities among these approaches or tools; selecting from among the priorities; drafting proposed legislation; enacting legislation; identifying policy problems left for the executive to resolve within the boundaries of the legislation; identifying approaches or tools for regulations and other management strategies; setting priorities for these; selecting from among them; drafting proposed regulations; enacting regulations; implementing regulations (through project or program management, permits, etc.); enforcing law through executive agency adjudication; and enforcing law through litigation within the jurisdiction of the judicial power.⁷³ Collaborative governance entails collaboration with stakeholders and the public across this continuum.

At each stage in the policy process, there is an opportunity to design an intervention intended to produce the rule of law. However, the complexity of policy dynamics is such that the impact of an isolated intervention may be swamped by the forces at play elsewhere in the policy process and in the other branches of government and institutions of governance.

C. Lessons for Design from Salient Failures in the Rule of Law

By viewing the policy process and these nested institutions more holistically, we can begin to see why the rule of law fails; sometimes we can learn more from failures than successes. The Third Reich represents perhaps the most salient failure of the rule of law in living memory. Interestingly, the Federal Judicial Center and the Holocaust Museum have collaborated on a professional development se-

69. Thomas Carothers, *Rule of Law Temptations*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW, 17, 22-23 (JAMES J. HECKMAN, ROBERT L. NELSON, AND LEE CABATINGAN, EDS., 2010).

70. *Id.* at 23.

71. *Id.* at 24.

72. See generally THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester Salamon ed., 2002). For a discussion of the analysis and selection of policy instruments, see B. Guy Peters, *The Politics of Tool Choice*, *id.* at 552.

73. See generally Eugene Bardach, *Policy Dynamics*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 336 (Michael Moran, Martin Rein & Robert E. Goodin, eds., 2008) (examining system dynamics in governance, a relatively new perspective and field) and THE SAGE HANDBOOK OF GOVERNANCE (Mark Bevir ed., 2011) (a comprehensive examination of both the theory and practice of governance).

minar for the federal bench using legal materials showing the history of the Third Reich and tracking its descent from the rule of law into the Holocaust.⁷⁴ This history recounts how President Paul von Hindenburg appointed Adolf Hitler as Reich Chancellor on January 30, 1933; on February 4, Hitler's cabinet tamped down on dissent by limiting free press and directing the police to ban political meetings and marches.⁷⁵ On February 27, a Dutch militant set fire to the Reichstag, which was the German parliament building; Nazi leaders seized upon the Reichstag fire to declare an emergency by alleging that the fire was part of a Communist plot against the state.⁷⁶ Hitler then effectively eviscerated the legislative branch with the complacency of the judicial branch through the Reichstag Fire Decree.⁷⁷ This decree suspended key political and civil rights provisions of the Constitution indefinitely.⁷⁸ The decree then became permanent. The German Supreme Court defined its role as a limited one, in the civil or continental law tradition; it did not step in to protect human or civil rights during the period after the decree.⁷⁹ The executive branch used security forces (the Gestapo and the Kripo) to take 25,000 people in Prussia alone into "protective custody" or "preventive arrest" based on their presumed threat to the public order, not on evidence of crimes committed; those imprisoned did not receive specific charges and they were incarcerated indefinitely.⁸⁰ The judicial branch essentially condoned this executive branch action.⁸¹

Hitler next hijacked the legislative branch through the *Law to Remedy the Distress of the People and the Reich* (the *Enabling Act*) on March 24, 1933.⁸² Hitler framed this "law" as a constitutional amendment that provided an alternative procedure for adopting laws; it provided that the Reich Government could enact laws unilaterally, issued by Hitler as Chancellor, which took effect the following day, without the participation of the legislature.⁸³ It also provided that these laws could deviate from the Constitution as long as they did not affect the

74. See generally WILLIAM F. MEINECKE, JR. & ALEXANDRA ZAPRUDER, LAW, JUSTICE, AND THE HOLOCAUST (Kathryn Grunder ed., United States Holocaust Memorial Museum 2009), available at <http://www.ushmm.org/education/foreducators/resource/> (scroll down the page to access individual sections under "Law, Justice, and the Holocaust") (last accessed Mar. 23, 2011). The story is chilling in its echoes for the present United States legal and institutional response to the terrorist attacks on the World Trade Center on September 11, 2001.

75. *Id.* at 8.

76. *Id.*

77. *Id.* at 9-10 (reprinting an English translation of the decree).

78. *Id.* at 9. Article 1 provided that:

Sections 114, 115, 117, 118, 123, 124, and 153 of the Constitution of the German Reich are suspended until further notice. Therefore, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association, and violations of the privacy of postal, telegraphic, and telephonic communications, warrants for house searches, orders for confiscations, as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

Id.

79. *Id.* at 11.

80. *Id.*

81. See *id.* (those held "had no right to appeal or access to a lawyer, and their arrests were not liable to judicial review").

82. MEINECKE & ZAPRUDER, *supra* note 74, at 15 (reprinting an English translation of the Act).

83. *Id.* (see Articles 1 to 3 indicating that "laws of the Reich may also be enacted by the Reich Government" and they "shall take effect on the day following the announcement").

institutions of the Reichstag and the Reichsrat.⁸⁴ Since it was a constitutional amendment, it required a two-thirds vote of the legislative branch for passage; to achieve this, Hitler used protective custody to detain 81 Communists and 120 Social Democrats in the legislature to prevent them from voting, and stationed security forces in the chamber to intimidate the remaining legislators.⁸⁵ Again, the judicial branch failed to intervene but accepted at face value the vote of those present; German judges accepted the legitimacy of the government.

Hitler's conquest of the judicial branch started with the *Law for the Imposition and Implementation of the Death Penalty* on March 29, 1933, which retroactively imposed the death penalty for certain crimes that were not punishable by death at the time they were committed, in other words, an *ex post facto* law.⁸⁶ In a test case, the court permitted its enforcement as to defendant Marinus van der Lubbe, but found his co-defendants not guilty.⁸⁷ As a result, Hitler ousted the Supreme Court of jurisdiction for political crimes and established a new court, the *Volkgericht*, in Berlin instead; the Supreme Court acquiesced in its loss of jurisdiction.⁸⁸ In the years that followed, Hitler enacted a comprehensive body of anti-Semitic legislation, and the Supreme Court gave it broad deference and effect.⁸⁹ The Supreme Court enforced statutes and edicts from the executive branch through individual cases to rationalize and legalize the Holocaust.⁹⁰

This is a story of broad institutional failure coordinated across three branches of government; it is a story of acquiescence in the systematic elimination of checks and balances on the exercise of unbridled power of the executive. It illustrates how the existence of the rule of law is a function of action by all three branches, upstream and downstream in the policy process.

Another example, lesser in magnitude and scope, is Brazil.⁹¹ In 1979, the military junta that had deposed the civilian government and taken control over the executive branch of government succeeded in getting the legislature to enact a statute granting amnesty for political crimes that was later interpreted to cover amnesty for government officials. The law is still in force, and has been construed to grant amnesty for crimes against humanity.⁹² Government violence continued into the 1980s; thus, the law in effect has been interpreted to grant amnesty for crimes that had not been committed at the time of its enactment.⁹³ That legislation established an executive branch body for granting reparations to certain categories of victims of the military coup and dictatorship.⁹⁴ However, the legislation

84. *Id.* (see Article 2). At the time, there were two legislative institutions, the Reichstag and the Reichsrat. The Reichstag refers both to the legislative institution and the building in which it is housed. The Reichsrat is a house of the parliament representing the German states.

85. *Id.* at 14.

86. *Id.* at 16.

87. *Id.*

88. MEINECKE & ZAPRUDER, *supra* note 74, at 16.

89. *Id.* at 32.

90. *Id.* at 32, 47, 49.

91. José Carlos Moreira da Silva Filho, *Memory and National Reconciliation: The Amnesty Impasse in the Unfinished Brazilian Democratic Transition* (draft paper in English on file with author).

92. *Id.* at 4.

93. Chief Justice Thomas J. Moyer, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 628-631 (2003).

94. In a report to the International Criminal Court, Brazil described the background as follows:

did not provide authority for that body to determine the truth, require executive branch or wrongdoer transparency, or establish a process for national reconciliation. It provided the new agency no power to force the executive branch to disclose files. It attached no conditions to amnesty and required no confessions.⁹⁵ The judicial branch recently upheld this legislation as constitutional and limited.⁹⁶

This example is interesting because amnesty and reparations are often means to achieve reconciliation following civil unrest; they are intended as steps to restore the political order and rule of law.⁹⁷ Amnesty may be essential to reconstruct civil society after conflict; however, without truth and reconciliation, amnesty becomes a cover-up of official corruption.⁹⁸ Reparations seem like hush money.

One can argue that this law failed in its design. The executive branch failed to provide transparency or truth. The legislative branch failed to engage the public and stakeholders in either the process of determining the acceptable conditions for amnesty, or in the process of meeting those conditions and implementing a grant of amnesty. The law provided for no judicial recourse for the underlying crimes beyond the administrative and formulaic provision of limited financial reparations. It did not operate across the policy continuum upstream or downstream to engage stakeholders and the public in governance. Moreover, the judicial branch failed to strike down a law prospectively granting amnesty for political crimes. Together, there was a failure of the executive branch amplified by action across the other two branches.

In the 1970s, under military rule, there were cases in which political dissidents were kidnapped and assassinated by members of the security services. In the wake of the return to democracy there have been demands for investigations to be carried out to identify the missing persons and those responsible for their disappearance. To this end, the Ministry of Justice has been liaising with the military ministries within the framework of a government commission established to review the matter. It should, however, be pointed out that the 1979 Amnesty Law, which allowed thousands of political exiles to return to Brazil, grants general amnesty, both for political dissidents and for security agents responsible for violating human rights. No cases of people missing for political reasons in Brazil have been reported since the mid-seventies.

INTERNATIONAL CRIMINAL COURT, HUMAN RIGHTS COMMITTEE, INITIAL REPORTS OF STATES PARTIES DUE IN 1993: BRAZIL (1995) <http://www.icc-cpi.int/NR/rdonlyres/8D264D29-A062-4ED4-BB48-C60CCBC70277/252957/377025.pdf>.

95. Tracey Begley, *International Legal Updates*, 17 HUM. RTS. BR. 40, 41-42 (2010).

96. *Brazil Court Upholds Law That Protects Torturers*, AMNESTY INT'L (Apr. 30, 2010), <http://www.amnesty.org/en/news-and-updates/brazil-court-upholds-law-protects-torturers-2010-04-30> (last accessed Mar. 21, 2011).

97. See, e.g., William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003) (advocating reparations for crimes against Native Americans); Judith Schonsteiner, *Academy on Human Rights and Humanitarian Law: Articles and Essays Analyzing Reparations in International Human Rights Law: Dissuasive Measures and the "Society as a Whole." A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 AM. U. INT'L L. REV. 127, 130 (2007) (discussing reparations as a means of making victims of injustice and violations of human rights law whole and specifically discussing nonmonetary reparations and the right to truth and observing that "Prevention of recurrence cannot be achieved without considering the wider societal, legislative, executive, and judicial measures in the respective states"); and Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 A.J.I.L. 952, 954 (2001) (discussing how "many peace agreements still combine truth and reconciliation mechanisms with amnesty provisions, international legal practice has clearly shifted from blanket amnesties toward either conditional or limited amnesty models").

98. Begley, *supra* note 95, at 42.

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In each case, a failure in the rule of law may start in one branch, but it ultimately stems from coordinated action, or inaction, among and across the branches and policy process as a whole. The respective executive, legislative, or judicial powers of government fail to enact the rule of law. The overall system design for government does not force them to. Moreover, the designs do not expressly provide for extensive collaboration with the public and stakeholders, or collaborative governance, to provide an outside check on the executive branch. These cases simply illustrate how we might begin to reexamine nested institutions across the policy process and their relation to stakeholders and the public in connection with the rule of law.

D. International Election Principles Across the Policy Continuum

One essential means toward rule of law ends is establishing democracy through legitimate elections.⁹⁹ However, the following discussion will show that achieving legitimate elections as a means to that end involves a sequence of both substantive and procedural systems design elements across the policy process and the three branches of government. It also necessarily entails action by the public and stakeholders. For example, elections require substantive law in the form of a constitutional provision and related enabling legislation that defines who is entitled to the franchise.¹⁰⁰ Elections also require legislation creating a substantive right to information transparency to ensure that voters have what they need to exercise the substantive right to vote meaningfully.¹⁰¹ The legislative branch must also enact procedural safeguards, enforceable through administrative and judicial means, to ensure that voters may exercise the franchise. For example, nation-states must establish eligibility to be listed in a registry of voters to protect against voter fraud.¹⁰² The legislative branch can also enact substantive anti-corruption rules requiring disclosure of campaign contributions and financing.¹⁰³

The executive branch generally supervises the mechanics of an election; thus, the legislative branch must provide a means of recourse, a procedural remedy, to challenge executive branch action.¹⁰⁴ In other words, the system design must include processes for election dispute resolution. This may entail a process for appealing within the executive branch¹⁰⁵ or to the judicial branch.¹⁰⁶ The national system is nested within the international system, which may provide recourse to other entities such as international courts to protect human rights.¹⁰⁷ The means of

99. INTERNATIONAL ELECTION PRINCIPLES: DEMOCRACY & THE RULE OF LAW xii-xiv (John Hardin Young, ed., 2009).

100. Patrick Merloc, *Human Rights –The Basis for Inclusiveness, Transparency, Accountability, and Public Confidence in Elections*, in INTERNATIONAL ELECTION PRINCIPLES: DEMOCRACY & THE RULE OF LAW 3, 13 (John Hardin Young, ed., 2009).

101. *Id.* at 19-20.

102. *Id.* at 14-15; see also Michael May & Brenner Allen, *Voter Registration*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 93, at 135, 144-50.

103. Ryan Patrick Phair & Laurel E. Shanks, *Political Finance and Corrupt Practices*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 93, at 347, 354-64.

104. Merloc, *supra* note 100, at 28-29.

105. *Id.* at 31-32.

106. *Id.* at 33.

107. *Id.* at 23-25; see also, Benjamin E. Griffith and Michael S. Carr, *Effective, Timely, Appropriate, and Enforceable Remedies*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 100, at 373, 382-91.

recourse should include a procedure for recounts¹⁰⁸ to challenge the outcome of an election.¹⁰⁹

The public, other non-governmental organizations, and stakeholders also play a critical role in legitimate elections. A free press ensures that candidates for election undergo critical scrutiny and are accountable.¹¹⁰ Moreover, election monitoring conducted by civil society can enhance both accountability and legitimacy.¹¹¹

These are just a few illustrations of the procedural and substantive structural components in the legislative, executive, and judicial branches and across the policy continuum that are necessary elements of a dispute systems design for free and fair elections as a means to achieve the rule of law.

IV. DESIGNING GOVERNANCE ACROSS THE BRANCHES AND THE POLICY CONTINUUM TO PRODUCE THE RULE OF LAW

Many rule of law initiatives are efforts at reforming public institutions. It may be helpful to reframe these efforts to achieve the rule of law through the lens of DSD. This new frame would suggest that those seeking to design a system of governance to achieve the rule of law consider the following steps:

- Identify with more precision the ends, or goals, for achieving rule of law in relation to the social, cultural, and institutional context¹¹² of each initiative;
- Focus on the means of achieving these more contextualized rule of law ends;
- Categorize these means as substantive or procedural;
- Identify where in the policy continuum they occur;
- Identify how they are nested in the institutions that form government;

108. See generally John Hardin Young, *Recounts*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 100, at 283-306.

109. See generally Steve Bickerstaff, *Contesting the Outcome of Elections*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 100, at 307-344.

110. Merloc, *supra* note 100, at 38. Merloc observed: "Community forums, debates, broadcast media, call-in shows, and interactive online programs, whether organized by citizen groups, media outlets, EMBs [election management bodies], or others, provide information needed for electors to make informed voting decisions." *Id.*

111. *Id.* at 37; see also, Cameron Quinn, *Conduct of Election Day*, in INTERNATIONAL ELECTION PRINCIPLES, *supra* note 100, at 241, 265-72.

112. See Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 TEX. L. REV. 1339, 1372 (2009). Professor Hirschl has identified a number of these in a recent review of the empirical literature on constitutional design:

A quick look at other design domains, macro and micro, suggests that factors such as detailed schemes, manageable size and scope, a low number of intervening factors, effective control mechanisms, built-in self-learning and adjustment mechanisms, and above all, sheer devotion and genuine benevolence may enhance the chances of success of many planning experiments. But when it comes to constitutional design, most of these lessons of the trade are overlooked or prove difficult to achieve. Even more fundamentally, factors such as manageable population size, high education and human capital, a developed market economy alongside a functional social safety net, and strong state capacity account for democracy, prosperity, and human development more than the institutional factors that often occupy constitutional engineers' vocabulary.

Id.

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- Identify whether there are reinforcing structures across the legislative, executive, and judicial branches;
- Identify the role of the public, stakeholders, and informal institutions; and
- Identify metrics and indicators to measure how well they are achieving rule of law ends in the context of the institution in which they are embedded.¹¹³

Ideally, the public and stakeholders should be part of the process of design. Of necessity, many of the means for establishing the rule of law as an end will entail engaging stakeholders and the public in the process of governance. The following discussion will give a few examples of substantive and procedural rule of law initiatives in relation to their legislative, executive, and judicial components.¹¹⁴

A. Structural Choices in the Legislative Branch

The legislative branch can support collaborative governance through an appropriate legal framework for both the procedural and substantive elements of the rule of law. For example, it can enact procedural laws on transparency, public participation, and administrative process including judicial review.¹¹⁵ It can enact the legal framework for mediation and arbitration, which are also procedural interventions.¹¹⁶ It can enact substantive laws on civil and political rights, and the protection of private property from expropriation. It can enact the legal framework for post-conflict reconstruction through substantive laws that establish the conditions for a grant of amnesty, and through procedural laws that establish truth and reconciliation processes.

As the legislature considers proposals, it can use dialogue and deliberation to engage the public in identifying problems, solutions, and priorities for law-making.¹¹⁷ Legislative bodies commonly conduct public hearings or committee hearings to collect background information in preparation of legislation. However, there are other ways of engaging the public, including deliberative democracy, dialogue and deliberation, and public policy consensus-building efforts.

B. Structural Choices in the Executive Branch

Interventions in the executive branch that contribute to the rule of law include transparency both in process and records, for example, releasing documents and

113. Daniel B. Rodriguez, *et al.*, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1471-72 (2010). A more expansive discussion of the evaluation problem is outside the scope of this article.

114. A comprehensive analysis of all the possible structural components of a dispute systems design of governance to produce the rule of law is beyond the scope of this first, and meager, effort.

115. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 304 (2010).

116. *Id.* at 312.

117. For a related argument, see *cf.* Mariana Hernandez Crespo, *Building the Latin America We Want: Supplementing Representative Democracies with Consensus-building*, 10 CARDOZO J. CONFLICT RESOL. 425 (2009) (arguing that adding a consensus-building function into the legislative process lets the public contribute in a satisfactory way).

files to the public. Examples of possible interventions include those modeled on the Obama Administrations Open Government Initiative and similar initiatives worldwide.¹¹⁸ The executive branch may issue rules, regulations, or guidance implementing the legislature's legal framework for mediation, arbitration, and collaborative governance.¹¹⁹

The executive branch may provide new agencies, institutions, or forums to implement or oversee rule of law initiatives. It may use dialogue and deliberation as part of transitional justice. For example, the Brazilian Ministry of Justice created the Amnesty Commission to seek truth and reconciliation, although the legislative branch had only authorized reparations.¹²⁰

Similarly, the executive branch may enter into collaboration with civil society, stakeholders, and international non-governmental organizations (NGOs) to avoid a breakdown in the rule of law.¹²¹ In Eastern Europe, the Project on Ethnic relations brought together political leaders in Romania and Montenegro with representatives of majority and minority ethnic communities for high level dialogues and problem-solving sessions to achieve consensus on a variety of issues, including the structure of minority education, autonomy in local government, and power-sharing in the legislature.¹²²

C. Structural Choices in the Judicial Branch

Courts are sensitive to structural choices. Authoritarian regimes can manipulate courts through a variety of techniques such as purging judges, changing the structure and jurisdiction of the court, and intimidation.¹²³ In authoritarian regimes, judicial independence is limited.¹²⁴ In contrast, independent courts can play an important role in democratization through decisions protecting civil and political rights.¹²⁵ Examples of rule of law initiatives in the judicial branch in-

118. Bingham, *supra* note 115, at 312.

119. See generally, e.g., the gateway website of the Federal Interagency ADR Working Group, <http://www.adr.gov> (last accessed Mar. 22, 2011).

120. *Memory and National Reconciliation*, *supra* note 91.

121. Allen H. Kassof, *Taming the Beast: Interethnic Conflict and Accord in Postcommunist Europe*, in BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD 17, 20-21, 27, 37 (Craig Zelizer & Robert A. Rubinstein, eds., 2009).

122. Craig Zelizer & Robert A. Rubinstein, *Creating Structure and Capacity for Peace*, in BUILDING PEACE, *supra* note 121, at 1, 7.

123. Tom Ginsburg in *The Politics of Courts in Democratization*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW, *supra* note 17, at 175, 176, observed:

These formal and informal techniques are well known. Regimes can impact the courts through controlling composition, such as by purging old members, appointing new ones and expanding or contracting the size of courts. They can manipulate career incentives to encourage judicial conformity. They can also focus on the design of the judicial arena, manipulating jurisdiction and creating special courts for categories of cases that are especially politically salient. They can pass new laws to overturn errant judicial interpretations. And in extreme cases, regimes can intimidate judges directly.

Id. Note that as previously discussed, Hitler used some of these techniques to limit the power of the German Supreme Court. See *supra* notes 85-88 and accompanying text.

124. Ginsburg, *supra* note 17, at 177.

125. *Id.* at 180. Ginsburg observed that:

[A] court decision raises the cost of repression and is a resource that can be used by activists to rally supporters to their cause. The court decision legitimates regime opposition and raises the costs of repression. A regime that arrests citizens after an unfavorable court decision will suffer

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clude local dispute resolution such as the Gacaca Courts in Rwanda,¹²⁶ multi-door courthouse projects,¹²⁷ and other decentralized institutions to improve access to justice.¹²⁸ Initiatives also include private justice systems, such as commercial arbitration and independent arbitrators in response to concerns over a lack of independence in the judiciary, as in the case of bilateral investment treaty arbitration intended to protect private property from expropriation.¹²⁹

D. Structuring Choices Across the Policy Continuum so that the Branches of Government Reinforce Them

It is important to consider how interventions may require coordinated action across the policy continuum. For example, transparency is a critical procedural intervention in governance to help produce the rule of law.¹³⁰ How would an intervention produce transparency? The legislative branch might enact a law to require public access to government records. However, such access is not self-enforcing. The executive branch has to implement the law by providing access to government records upon request or by providing disclosure through electronic or hard copies of the requested documents. This requires both a mechanism or process for implementation and a means of enforcing implementation. It might be desirable to provide independent supervision of the executive branch to insure implementation through monitoring by non-governmental organizations. It might also be necessary to provide for review of the executive branch's implementation of the transparency laws by the judicial branch.

Similarly, in post-conflict and post-crisis societies, returning refugees and those dislocated by the conflict can find that their homes have been destroyed or resettled; this can create a question of title in the property.¹³¹ Parties may be able to address these land and property disputes through designs including mechanical or procedural bureaucratic approaches, unassisted negotiation, technical assis-

greater reputational loss than it would before that decision. This is not to say that the court decision guarantees implementation - only that it can facilitate mobilization.

Id.

126. See, e.g., Phyllis E. Bernard, *Begging for Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda*, 7 CARDOZO J. CONFLICT RESOL. 325 (2006); Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765 (2007); Maya Goldstein-Bolcan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004).

127. E.g., University of St. Thomas International ADR Research project entitled "Investing Social Capital: Exploring the Multi-Door Courthouse as a Catalyst to Maximize Latin American Dispute Resolution Systems," directed by Professor Mariana Hernandez Crespo, <http://courseweb.stthomas.edu/mdhernandezc/> (last accessed 4/25/11); Frank Sander and Mariana Hernandez Crespo, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665 (2008).

128. Moyer, *supra* note 93.

129. See, e.g., Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337 (2007) and Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

130. See generally Transparency International, <http://www.transparency.org/> (last accessed Mar. 22, 2011).

131. Christopher Moore & Gary Brown, *Designing Dispute Resolution Systems for Settling Land and Property Disputes in Postconflict and Postcrisis Societies*, in BUILDING PEACE, *supra* note 121, at 79, 79.

tance, coaching, third party conciliation, facilitation, or mediation, and various forms of arbitration.¹³² However, comprehensive designs may be more effective,¹³³ and sometimes these designs must include legislative action to achieve land reform.¹³⁴

South Africa's Truth and Reconciliation Commission (TRC) illustrates a systemic design that integrated the participation of all three branches of government as well as civil society. It was the product of the legislative process.¹³⁵ Its enabling statute defined the conditions of amnesty and applied those conditions to crimes committed during a limited period.¹³⁶ It also created a quasi-judicial institution, the TRC, and empowered it to hold public hearings.¹³⁷ The TRC broadly engaged the public in these hearings through committees, direct testimony, public access, and broadcasts.¹³⁸ It provided for truth as a precondition of reconciliation, not simply for reparations upon demonstration of injury as in the case of Brazil.¹³⁹ Its design was both substantive (conditions of amnesty) and procedural (transparency as a means of reconciliation). In the absence of amnesty, the executive and judicial branches continued to have jurisdiction over prosecutions and appeals.¹⁴⁰ The TRC is widely viewed as a successful DSD.¹⁴¹ It contributed to a peaceful transition from apartheid to a democracy and the rule of law in South Africa.

E. Structural Choices Entailing Civil Society, Collaborative Governance, and Informal Institutions

For governance designers to make progress toward the rule of law, they must engage stakeholders and the general public. In an empirical study of transitions from dictatorship to democracy; nonviolent civic forces, or people power, played a key role in achieving freedom; there was comparatively little effect for top down transitions led by elites; and cohesive nonviolent civic coalitions were the most important factor contributing to a transition.¹⁴² Similarly, one stream of rule of law research holds that formal institutions are necessary, but not sufficient, to achieve the rule of law and that informal institutions, such as voluntary networks,

132. *Id.* at 82-86.

133. *Id.* at 87-88.

134. *Id.* at 91-92.

135. See generally Truth and Reconciliation Commission, <http://www.justice.gov.za/trc/> (last accessed Mar. 22, 2011).

136. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (last accessed Mar. 22, 2011).

137. *Id.* See also James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 LAW & SOC'Y REV. 5 (2004).

138. See, e.g. Register of Reconciliation, <http://www.justice.gov.za/trc/ror/index.htm> (last accessed Mar. 22, 2011). There are transcripts of amnesty hearings, and decisions on amnesty, available at <http://www.justice.gov.za/trc/amntrans/index.htm> (last accessed Mar. 22, 2011).

139. Moyer, *supra* note 93, at 631.

140. Promotion of National Unity and Reconciliation Act 34 of 1995 § 21, available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (last accessed Mar. 22, 2011).

141. See generally James L. Gibson, *The Truth About Truth and Reconciliation in South Africa*, 26 INTL. POL. SCI. REV. 341 (2005), available at <http://www.jstor.org/stable/30039021> (reporting the results of a large scale empirical study finding that the TRC was viewed as largely successful).

142. See generally Adrian Karatnycky & Peter Ackerman, *How Freedom is Won: From Civic Resistance to Durable Democracy*, FREEDOM HOUSE (2005), available at http://www.freedomhouse.org/uploads/special_report/29.pdf (last accessed Mar. 22, 2011).

are essential.¹⁴³ Recent empirical work is focusing on informal self-regulating networks in trade and the economy. For example, in Vietnam, the formal legal system is weak, but private parties find ways to structure exchanges.¹⁴⁴ Vietnamese farmers create their own informal trading system and engage in complex trading transactions including the provision of credit.

Rule of law initiatives not only include institution-building within and across government, but also collaboration between governments, the public, and stakeholders. One model is to build local capacity through an NGO independent from government, as in the case of Partners for Democratic Change.¹⁴⁵ Its Slovakia affiliate worked over a period of years to disseminate cooperative conflict management skills through training leaders from the NGO, local government, and private sectors; training trainers to provide a multiplier effect; applying conflict management processes such as mediation, facilitation, and consensus-building; and promoting public policy supporting mediation.¹⁴⁶ In Slovakia, Partners developed conciliation commissions to assist ethnic communities with conflict management and reconciliation.¹⁴⁷

V. CONCLUSION: AFTER DESIGN, EVALUATION

To achieve the rule of law, designers may need to structure interventions across the policy continuum as a whole in a way that causes the three branches of government to reinforce the interventions. At each point on the policy continuum, there are opportunities to engage the public and stakeholders, and to provide for voice and participation. Designers should consider not only formal but informal institutional arrangements in the context of social norms, history, and culture. Dispute systems design also requires a pragmatic willingness to identify metrics and indicators of success for the system and measure its performance in light of its goals. Empirically evaluating design efforts and adjusting designs in response to these results is a final and critical piece;¹⁴⁸ it permits repeated democratic experimentalism over time. By adopting a systems perspective, a broad conception of governance, and a commitment to continuous evaluation, it may be possible for us to design governance to produce the rule of law.

143. Stephan Haggard et al., *The Rule of Law and Economic Development*, 11. ANN. REV. POLI. SCI. 205, 220 (2008). The authors observed that:

Key to the success of these self-governing informal frameworks are three core elements: the dependence of traders on reputation; the capacity of informal institutions to provide and relay information on transgressions among the network of participants; and the existence of a fully incentive-compatible and decentralized sanctions mechanism in the simple form of the refusal to deal.

Id.

144. See Brian J.M. Quinn and Anh T.T. Vu, *Farmers, Middlemen, and the New Rule of Law Movement*, 30 B.C. THIRD WORLD L.J. 273, 319-22 (2010).

145. Beth Glick & Laina Reynolds Levy, *The Institution as Innovator: Laying the Foundation for Peaceful Change*, in BUILDING PEACE, *supra* note 115, at 39, 39.

146. *Id.* at 41.

147. *Id.* at 45.

148. Jeffrey K. Staton, *A Comment on the Rule of Law Unplugged*, 59 EMORY L.J. 1495, 1512-13 (2010).

